

Corona-Triage and Human Dignity

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1.

Does the duty to protect human life have an essence of dignity? The „triage“ of COVID-19-patients, i.e. their sorting due to scarce treatment capacities, raises this question. The answer is yes: It would violate the state's duty to protect human dignity, for example, if the state gave orders to save not as many lives as possible, but as many young people as possible.

2.

An Italian medical association based its [recommendations](#) of March 6 on the principle of maximizing the number of years of life saved in such a triage. A doctor at a clinic in Bergamo, in northern Italy, described its application in an [interview](#) with the New York Times podcast („The Daily“ on March 17) as follows: „If you are 85, I give the bed to another one who is 45... [I]t's difficult to tell people that if you are 80, you will never have the I.C.U. bed.“ In France (Alsace), according to news reports, corona patients over a certain age ([75](#) oder [80](#) years) are no longer ventilated.

3.

[Weyma Lübbe](#) has convincingly demonstrated that the principle of maximizing the number of years of life saved can only be based on a utilitarian justification – unlike the traditional maxim for triage to maximize the number of lives saved. She has shown that this principle leads to inhumane consequences: If implemented consistently, it could mean that a 60-year-old woman would still have to be denied treatment with a ventilator in favor of a 20-year-old man, even if she could very likely (70%) be saved by the treatment, but would die without it, whereas the 20-year-old would probably survive even without treatment (70%), but his probability of survival could be improved to almost 100% with the treatment. The calculation shows that in such a case more years of life could probably be gained if the 20-year-old is ventilated, not the 60-year-old.

4.

If enforced by the state, such a principle of maximizing life expectancy when triaging corona patients would violate the state's duty to protect human dignity. Since it would treat life as a commodity to be aggregated and maximized according to its duration, it would be incompatible with everyone's equal dignity.

„Rights work non-aggregatively“, as Lübbe emphasizes from a philosophical point of view: „In times of shortage, they do not have to be maximized, but rather specified in a just manner.“ For the essence of dignity of the fundamental rights in Germany and Europe this basic idea is guaranteed by positive law as well.

For the German Constitution, this follows from the fact that its right to dignity (Article 1) was intended to withdraw an essence of fundamental rights as inviolable and „balancing-proof“ from consequentialist computations (cf. [here](#), p. 558 et seq., and [in German] [here](#), p. 398 et seq.).

In the Parliamentary Council which drafted the Constitution, Carlo Schmid emphasized that human dignity rests on rights, which characterize the „minimum standard from which we want to start, the absolute barrier that is set up against the *raison d'état*“:

„The necessary *raison d'état* that no one disputes must stop at a certain barrier. The state must occasionally act opportunistically, but somewhere it must be able to forego its advantage if it sees that it would otherwise have to trample on certain human rights.“

And Ludwig Bergsträsser agreed with Schmid that human dignity had to be delimited „against an exaggerated *raison d'état*“ (cf. [here](#), p. 70-71):

„The state must recognize certain human rights, whether or not their disregard would be useful for a current state purpose. We want to get rid of this *raison d'état* utilitarianism.“

Human dignity is therefore supposed to protect some absolute limits against a „*raison d'état* utilitarianism“. The same holds true for the European Convention on Human Rights, which subscribed to the same basic principles, and for the Charter of Fundamental Rights of the European Union, Article 1 of which declares, just like the German Constitution, that „human dignity is inviolable“ (cf. on the essence of fundamental rights, as set out in Art. 52(1) of the Charter, as providing absolute „limits against limitations“ of rights: Lenaerts [here](#)).

5.

For the right to life as a right against the state the German Constitutional Court has therefore rightly recognized limits of „balancing life against life“.

In its judgment on the Aviation Security Act, the court referred to post-war judgments on „comparable cases“ (cf. BVerfGE 115, 118 [139 et seq., 157]; in English: [here](#), §§ 84 et seq., 130; citing OGHSt 1, 321 [331 ff., 335 ff.]; 2, 117 [120 ff.]), which relied (for criminal law) on the principle that killing cannot be justified by balancing life against life.

The doctors of mental institutions who had aided the National Socialist „euthanasia“ murders of mentally handicapped people by transferring their patients, had raised the defence against their criminal prosecution that they had tried to save lives: if they hadn't participated, then other, more ruthless doctors would have taken their place, so that more people would have been murdered. The courts did not accept this defence: They refused to view the participation in the mass murder as justified by the balancing of life against life.

The Federal Constitutional Court interpreted the right to human dignity accordingly when it decided in 2006 that shooting down a passenger plane hijacked by terrorists violates the human dignity of the innocent passengers even if it is supposed to save thousands of people from a – non-warlike – attack like that on the World Trade Center on September 11, 2001.

For the same reason, the police would violate the essence of dignity of the right to life as well if it tried to stop a truck which is used by a terrorist to attack a Christmas market but accepted the certain or highly probable death of several innocent passers-by as collateral damage. The Bavarian Police Law licencing such use of explosives since 2018 is therefore just as unconstitutional as was the authorization to shoot down an aircraft in the Aviation Security Act (cf. [this](#) constitutional complaint [German]).

In such situations, the state may not kill innocent people „because they are fewer than it hopes to save through their homicide“ (cf. Burkhard Hirsch, *KritV* 89 [2006], p. 3 [11 f.]). The fundamental right to respect for human dignity includes a balancing-proof right of innocents against the state not to be killed on the basis of such a calculation of the numbers of people saved.

6.

What holds true for the rights of life and dignity as rights against the state does, however, not necessarily also hold true for the state's duty to protect those rights.

The state may try to save as many lives as possible, for example, if it does so not by actively killing innocent people, but by simply refraining from emergency measures, because it cannot everyone: After an avalanche, a state rescue service who can only search either for a smaller or for a larger group of buried people, can choose to try to rescue the larger group. When distributing scarce rescue resources it can be a legitimate goal to maximize the number of lives saved. The ban on balancing life against life, following from the right to human dignity, is therefore more comprehensive for the right to life as a right not to be killed, directed against the state, than for to the state's duty to protect one's life.

This does not mean, however, that when the state's duties to protect each of several lives collide, every reason given to resolve such a collision could be reconciled with the right to equal dignity for all. The state can try to save as many people as possible, but when deciding on scarce resources, it may not discriminate according to age or suspected criteria like race, sex, disability, language, origin, faith or religious or political opinions (cf. [Art. 3\(3\) GG](#)) in a manner violating the minimum standard of equal freedom guaranteed by human dignity (cf. [in German] [here](#), pp. 307 et seq., 607 et seq.).

Not only the state's obligation to respect the dignity of all people but also its obligation to protect that dignity places absolute limits on balancing and aggregative trade-offs between one life and another.

7.

It is therefore to be welcomed that the recommendations of seven German medical associations of March 25 for the „Allocation of resources in emergency and intensive care medicine in the context of the COVID-19 pandemic“ emphasize that it is impermissible to prioritize solely due to age or social criteria and that „human lives must not be weighed against human lives“ for constitutional reasons (cf. [here](#), p. 3 [in German]).

In its ad hoc recommendation „Solidarity and Responsibility in the Corona Crisis“ of March 27, the German Ethics Council also rightly emphasizes that the guarantee of human dignity secures a „basic protection against discrimination for all“ and not only prohibits that the state requires differentiations „based on gender or ethnic origin“ in allocating life chances, but also forbids that it classifies patients „based on age, social role and their assumed ‘value’ or a predicted lifespan“ (see here, p. 3 [in German; English translation shortly [here](#)]).

It is crucial for the protection of human dignity that allocations of medical resources in times of scarcity may not be based on the criterion of expected “remaining years of life”, but only on the probabilities of survival and chances of recovery of the specific patient. A 90-year-old, for example, might promise a successful treatment as much as some younger people: think, for example, of U.S. Supreme Court Justice John Paul Stevens, who still played tennis every day when he retired at the age of 90, and wrote two books afterwards – before he died at age 99. We should perceive and appreciate each other in our uniqueness, even in the most difficult times. Our common and equal dignity demands no less.

